No. 09-426

SUPREME COURT, U.S.
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In The Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, MONTANA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

In an action where a plaintiff alleged negligence by county law enforcement officers, is the fact the jury was comprised of taxpayers from the defendant county a violation of the injured party's right to due process under the Fifth and Fourteenth Amendments?[1]

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[1] The Petition makes reference only to the Fourteenth Amendment. This Court has stated that a " . . . generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights." *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988). However, Petitioner did reference the Fifth Amendment in his pleadings in the court below.

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JURISDICTION

The decision of the Montana Supreme Court rested on adequate and independent state law grounds and should preclude this Court's review. The opinion below hinged on specific state statutes which govern jury trials and reflected the propriety of granting broad discretion to a state trial court in matters of jury selection and impartiality, especially in cases limited to state law claims such as those at issue in the underlying action. The decision was appropriately based upon long-standing state law precedents rendered by the Montana Supreme Court in reviewing jury trials within the state. No federal law was invoked; no federal guidance was required for the Montana Supreme Court to properly decide the issues before it. The opinion rendered was neither spurious, nor evasive.

Nothing would be gained by this Court's review of the central due process challenge because the panoply of such protections specified in the Montana Constitution's Declaration of Rights (Article II, Sections 1-35), are greater than those set forth in both the U.S. Constitution and recent decisions of this Court. Particularly in matters of substantive due process this Court increasingly casts doubts about its belief in the existence and extent of such rights. *District Attorney's Office v. Osborne*, 557 U.S. ___, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). The Montana Supreme Court has not expressed any such reservations, and broad constitutional rights are well recognized and enforced in the state. See *Snetsinger*

v. Montana University System, 2004 MT 390, ¶¶ 54-55, 325 Mont. 148, 104 P.3d 445 (holding that the university system's policy of denying health benefits to unmarried same-sex couples while granting benefits to opposite-sex couples is a denial of equal protection, Nelson, J. concurring). In addition, the Montana Supreme Court has long considered all rights set forth in the Declaration of Rights to be "fundamental" triggering the highest level of scrutiny. *Id.* at ¶ 56. If that Court did not find a constitutional violation here under Montana's broader, more protective rule of due process law, clearly there is no required "compelling reason" under Rule 10 for this Court to accept jurisdiction. The state law grounds are more than adequate.

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to those listed in the Petition, the Montana Supreme Court had before it an additional statute wherein the Montana Legislature established proper venue for an action against a "public officer" as being the county where the cause arose. *Section 25-2-125, MCA.*

STATEMENT OF THE CASE

Petitioner/Plaintiff Donald Eklund ("Eklund") filed this action based on allegations of negligence by

various parties in relation to injuries he suffered as a result of a motor vehicle accident. The specific allegations against Respondents/Defendants Wheatland County and its Sheriff ("the County") stemmed from the actions of certain Wheatland County deputies regarding their attempt to apprehend the driver of a stolen vehicle. The accident occurred during that attempt.

The County filed a motion for summary judgment arguing its defendants were entitled to judgment as a matter of law as to any alleged negligence. The District Court granted the County's motion. The matter first went to trial against one of the remaining defendants; a Wheatland County jury returned a verdict for the defense. Eklund appealed the verdict and the grants of summary judgment in favor of various defendants. The Montana Supreme Court affirmed the jury verdict and summary judgment for all defendants except Wheatland County and its Sheriff. *Eklund v. Trost*, 2006 MT 333, 335 Mont. 112, 151 P.3d 870 (*Eklund I*). The procedural history upon remand is fully explained in the decision at issue here. *Eklund v. Wheatland County*, 2009 MT 231, ¶¶ 9-13, 351 Mont. 370, 212 P.3d 297.[2]

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[2] Respondents refer the Court to the official or unofficial reports of the decision rather than Petitioner's Appendix which appears to contain a number of typographical errors not in the original.

The facts **material** to consideration of the question presented are straightforward. The initial specific claim against the County related to a short, high speed chase which involved Wheatland County deputy sheriffs seeking to apprehend the driver of a reported stolen vehicle. The driver lost control of the vehicle; Mr. Eklund was seriously injured when the vehicle struck him. Because the Petition claims there was "overwhelming evidence" of negligence, Respondents must set forth the facts relating to the pursuit in some detail. Actions taken by the law enforcement officers were recorded in the dispatch radio log for the shift in question. That log was entered as Trial Exhibit (*Trial Ex.*) *87*; it provides a timeline crucial to proper consideration of alleged negligence by the officers because it shows what the officers knew and when they knew it.

At **9:59** a.m. on June 11, 2001, the Wheatland County dispatcher (Ms. Pallas) received a telephone call from the Musselshell County dispatcher (Rosie). Rosie stated she would be putting out an "Attempt to Locate" for a "signed stolen" vehicle which had been reported from Roundup, Montana. *Trial Ex. 87*, p. 1.[3] Shortly thereafter, Ms. Pallas radioed the following information to all units, Wheatland County and Musselshell County:

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[3] A "signed stolen" means the registered owner has signed a complaint stating she will prosecute the individual(s) who stole the vehicle. On this basis an officer can arrest the individual(s), not just stop and identify the person(s).

> Stand by for an ATL on a signed stolen out of Musselshell County. I received a report of a signed stolen out of Musselshell County on two (2) runaways from Billings. They are driving a red and maroon pickup with an overhead camper on it. There is (*sic*) no weapons in the vehicle. Pickup license plate number 23T-C276. It was reported that the teenagers there took the vehicle from Roundup approximately one hour ago.

Id., p. 5.

Contrary to a statement in the Petition (p. 6), no one at that time knew where the stolen vehicle was headed.

Wheatland County Undersheriff Les Christensen was the only officer on duty at the time. Contrary to Petitioner's statement (p. 6), when the initial call came in, he was in his vehicle traveling to a neighboring town (Judith Gap) for auto parts. He immediately radioed Ms. Pallas for more information, because he had not heard the entire radio message; he asked whether she had a more complete description of the pickup. She said yes:

> It's a '95 Dodge pickup, maroon and silver in color. Uhm, license is 23T-C276. One of the . . . the, ah, juveniles is from Meagher County and the other one is said to have a cabin . . . a cabin in the Martinsdale area . . . his parents do.

Id.

No one was certain as to the direction of travel of the Dodge; it had not been seen. *Trial Ex. 28*, p. 2.

At **10:55** a.m., Ms. Pallas next made contact with Undersheriff Christensen, who was then traveling south from Judith Gap. She relayed information the vehicle had been sighted by an informant in the neighboring town of Ryegate and was believed to be heading west toward Harlowton, a distance of 30 miles. This was the first time the stolen vehicle's direction of travel was known. Christensen agreed to head in that direction to assist. At **11:01** a.m., Christensen reported his location was 9 miles north of Harlowton. *Trial Ex. 23*, pp. 5-7; *Trial Ex. 87*, p. 2.

At **11:11** a.m., Undersheriff Christensen reported he had just met the stolen vehicle on Highway 12 three miles east of Harlowton. At **11:15** a.m., four minutes after Christensen's initial sighting of the Dodge, he called for emergency medical assistance because an accident involving the stolen vehicle had occurred. *Trial Ex. 87*, p. 2.

When Undersheriff Christensen had attempted to apprehend the Dodge just east of Harlowton, he and his passenger (Montana Highway Patrolman Jim Rosenberg, now Wheatland County Sheriff and named Defendant here) never saw the driver nor any other occupant of the Dodge. *Trial Ex. 28*, p. 10; *Trial Ex. 29*, p. 8. When Christensen's vehicle met the Dodge, Rosenberg observed:

> I didn't notice that they were traveling at a real high rate of speed at that time. You

> know, with the speed limit being at seventy (70), it didn't. . . . It didn't appear to me that they were going at a real high rate of speed, but then I wasn't . . . I wasn't judging that. I was trying to make sure to look to see if this vehicle mid . . . met the description and then I was trying to see the plates on the vehicle as it went by us.
>
> * * *
>
> And I mean, was it . . . was it going exceptionally fast to where I noticed it was going exceptionally fast, I don't believe so.

Trial Ex. 29, pp. 6-7.

When and after Undersheriff Christensen executed a U-turn to follow the Dodge, the speed of the two vehicles stayed at seventy (70) to eighty (80) miles per hour, until Christensen slowed down to approximately fifty (50) miles per hour when he realized both vehicles were going too fast in town. *Trial Ex. 29*, p. 3; *Trial Ex. 28*, pp. 5-6. Another driver witnessed the stolen Dodge, followed by Christensen, approach Harlowton. She testified the Dodge was traveling at a high rate of speed, but the police vehicle was not going especially fast. *Trial Transcript*, (*Trans.*), pp. 541-542.

These are the facts as related in real time by way of radio dispatches, plus contemporaneous recollection of an event that took four minutes to develop. The first contact the County's officers had with the stolen vehicle occurred at 11:11 a.m.; the tragic

accident had occurred by **11:15** a.m. when the pursuing officer called for emergency medical assistance.

REASONS FOR DENYING THE PETITION

Review is inappropriate for several reasons. First, this Court should not accept jurisdiction because the decision below rested on independent and adequate state law grounds.

Second, the Petition is based upon expansive contentions and gross assumptions; it relies on allegations of improper interest by veniremen which are highly speculative and contingent.

Third, the Montana Supreme Court correctly applied well settled law in finding the trial court did not abuse its discretion in the matter of jury selection. In essence, the Petitioner simply seeks a different result than the one rendered by that court which was grounded in long-established, properly stated rules of law.

Fourth, the Petition rests in large part upon unwarranted allegations of factual error by the jury because it did not find the County negligent; such error, if any, is not appropriate for review under Rule 10.

Fifth, the Montana Supreme Court did not decide an important question of federal law that has not been, but should be, settled by this Court; nor has it

decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sixth, the Montana Supreme Court correctly decided the case on the merits.

ARGUMENT

I. The decision below rests on independent and adequate state law grounds.

Petitioner's constitutional challenge is, and has consistently been, an as-applied challenge to the statutes rather than a facial challenge. An as-applied challenge by its very nature is heavily fact-driven, especially when it involves matters relating to *voir dire* and a jury's verdict. For this Court to accept review, it will be required to invade matters which historically have been the province of a trial judge. Such an intrusion is particularly inappropriate here because the due process protections granted under the state law, upon which the Montana Supreme Court based its decision, are greater than those afforded by federal law.

The Montana Constitution protects individual rights and liberties more broadly than the U.S. Constitution, and certainly more broadly than is reflected in recent decisions of this Court. Research by a respected Montana constitutional scholar shows that 17 specific protections memorialized in the "Declaration of Rights" in the Montana Constitution have

no parallel in the federal Constitution. *Dorwart v. Caraway,* 2002 MT 1, ¶ 86, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring). Also, the Montana Supreme Court has long considered all rights set forth in the Declaration of Rights to be "fundamental" thereby triggering the highest level of judicial scrutiny. *Snetsinger, supra*, 2004 MT 390, ¶ 56, 325 Mont. 148, 104 P.3d 445.

These many protections of individual rights are not hollow paper promises in Montana. As noted by Justice Nelson in the *Snetsinger* decision, the Montana Supreme Court has often breathed life into liberties such as the right to participate, the right to know, the right to individual dignity, right to privacy, right to a clean and healthful environment, and the right to personal autonomy. *Id.*, at ¶ 55. It is clear the Montana Supreme Court takes very seriously claims of constitutional violations such as due process. If that court determined Eklund did not meet his burden under Montana's broader and more protective rules of due process, surely the required "compelling reason" for review under Rule 10 does not exist here. The state law grounds are more than adequate.

II. The Petition is based upon expansive contentions and gross assumptions; it relies on allegations of improper interest by veniremen which are highly speculative and contingent.

The most crucial contingency and assumption, which lies at the very heart of Petitioner's claim, is that the trial testimony proved an impartial jury would have awarded Eklund's requested damages of $1,325,000 – the large sum which would prejudice every juror. In fact, the trial testimony showed actual damages of much less, for example, $100,000 medical damages. At the time of the accident, Petitioner was 65 years old; he was at the end of his working life, not the beginning where economic loss would have been far greater. Million dollar personal injury verdicts are rare, especially in states like Montana. To simply treat a million dollar jury request as a guaranteed award by a jury is nothing more than bold, subjective speculation. To base this Court's review on certiorari upon such speculation is inappropriate.

Petitioner's expansive contentions that evidence of negligence was "overwhelming" also cannot stand as proper basis for this Court to accept review. Such contentions have not been looked upon favorably by this Court even in a case cited by Petitioner. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, 106 S.Ct. 1586, 89 L.Ed.2d 823 (1986). The record reveals the following evidence which the judge, jury, and Montana Supreme Court all considered credible

and substantial enough to support the finding of no liability:

– At 10:55 a.m. Wheatland County personnel had their first knowledge the stolen vehicle appeared to be headed toward Harlowton, this while the officers were returning from a neighboring town to the north (Judith Gap). They had only a short time to respond; they responded based on the request by Golden Valley County personnel to attempt to intercept the vehicle. *Trans.*, pp. 364, 377-378.

– Wheatland County officers responded appropriately based on their training, utilizing lights and siren in an attempt to persuade the driver of the stolen vehicle to pull over and stop. *Trans.*, pp. 298, 378, and 789.

– Any road block that is utilized must provide for an escape route, and officers are trained not to completely block the road. *Trans.*, pp. 339, 382, 435, 763, and 799-800. Here, the evidence was clear the juveniles who stole the vehicle would not stop for such a road block, and would have had a way to bypass such a road block. *Trans.*, pp. 381, 436, and 800.

– The duration of time from the first observation of the stolen vehicle to the time of the crash was only about four minutes. *Trans.*, pp. 380-381. There simply was insufficient time to establish a road block or utilize stop-sticks. In any event, Wheatland County did not have stop-sticks. *Trans.*, pp. 296, 363, 444, and 764. Even had stop-sticks been utilized they

would not have stopped the vehicle; there was extensive testimony motor vehicles can go for extended distances with deflated tires even after stop-sticks have been utilized. *Trans.*, pp. 446-447, 765.

– Under Montana law, law enforcement personnel can exceed the speed limit. [*Section 61-8-107, MCA.*] In this case the officers backed off once they entered the town. *Trans.*, pp. 321, 343, 353, 369, 763, 784, and 800.

– One of the witnesses who pulled off to the side of the road after seeing the stolen vehicle close behind her, testified she did not believe the officers were traveling at an excessive rate of speed when they went by her, although the stolen vehicle was traveling at an excessive rate of speed. *Trans.*, p. 542.

– There was testimony that, even within the short period of time, there was communication between the officers in pursuit and the Dispatch Officer. *Trans.*, p. 334.

– There was testimony Undersheriff Christensen followed law enforcement policies as he had been trained. *Trans.*, pp. 378-379. His passenger, then-veteran Montana Highway Patrolman James Rosenberg, stated proper procedures were followed as he reflected in his training as a highway patrolman. *Trans.*, p. 793.

Such clear credible evidence could certainly lead an impartial jury to find no negligence on the part of these law enforcement officers who first sighted the

stolen vehicle four minutes and approximately three miles before the accident. Petitioner's contention that evidence of negligence was "overwhelming" is unwarranted and improperly expansive. To accept certiorari review on such grounds would not be proper under Rule 10.

Petitioner's "possible temptation" pecuniary test for prospective jurors also cannot be considered valid unless this Court makes broad assumptions such as: all taxpayer veniremen know the precise number of mills a municipality levies on all of their real property, and taxpayers can easily calculate in their heads the effect of any possible jury award on their tax bill. Such assumptions are insupportable. A property tax classification system is arcane and complex; in Montana, the Legislature has established 16 different classifications, many with numerous subclassifications. *See Title 16, Chapter 6, Montana Code Annotated*. It is not reasonable to assume veniremen would be able to make such calculations; even if they were, how would this Court determine which jurors could stay and which could be removed in a constitutionally acceptable manner.

Another crucial assumption would have to be that taxpayers/veniremen come to court solely by concern for their property tax bill. This Court would have to assume taxpayers cannot be trusted to be impartial, to consider the admitted evidence, to follow the instructions of the trial judge, and then reach a proper verdict. To accept Rule 10 review based upon such assumptions would not be rational or proper.

To impute bias to taxpayer veniremen requires further speculation. The Montana Department of Revenue was in the process of a well-publicized 10-year reappraisal of all real property in the state at the time of this trial. It was well known some values would go up and some down. What effect might that have had on the panel in light of a "possible temptation" rule? There is no end to questions like these if the Petitioner's test of "possible temptation" were reviewed by this Court.

III. The Montana Supreme Court correctly applied well-settled law in its finding the trial court did not abuse its discretion in the matter of jury selection.

The underlying cause of action here is based upon a motor vehicle accident which occurred in Wheatland County. The named defendants are Wheatland County and the Wheatland County Sheriff. Under clear Montana law, Wheatland County is the proper venue. *Sections 25-2-125, 126, MCA.*

Montana statutory law also includes a provision for challenges to jurors for cause in *Section 25-7-223, MCA*:

> **Challenges to jurors for cause.** Challenges for cause may be taken on one or more of the following grounds: . . . (5) interest on the part of the juror in the event of the action or in the main question involved in the action, except the juror's interest as a member or citizen of a municipal corporation; . . . .

Petitioner Eklund does not argue these statutes are unconstitutional on their face. Rather he claims they were misapplied by the trial court and affirmed by the Montana Supreme Court. There is no doubt due process requires a fair trial by a fair tribunal. But since Petitioner does not seek to have taxpayer status declared a disqualifying interest in matters such as these, the entire alleged violation depends upon uprooting and overturning two long-held principles regarding jury trials. One is the clear discretion of a legislative body with respect to challenges or qualifications of jury, or the mode of jury selection. See *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177, 81 L.Ed.2d 78 (1986). The other is the clear discretion accorded to the trial judge. See *Mu'min v. Virginia*, 501 U.S. 1269, 112 S.Ct. 13, 115 L.Ed.2d 1097 (1991). To raise to a constitutional level such "second-guessing" of a legislative body or trial judge, especially in matters relating to the results of *voir dire*, is not appropriate.

This Court has said an impartial jury consists of jurors who will conscientiously apply the law and find the facts. The party who seeks to exclude a juror due to bias must demonstrate lack of impartiality through questioning. The trial judge's duty is to determine whether the challenge is proper: " . . . did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed." This Court went on to state deference must

be paid to the trial judge who sees and hears the juror. *Wainwright v. Witt*, 469 U.S. 412, 422-423, 105 S.Ct 844, 83 L.Ed.2d 841 (1985).

Very recently this Court again looked to *Wainwright* when it addressed an issue of jury impartiality:

> The judgment as to whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations are entitled to deference even on direct review.
>
> * * *
>
> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. (cite omitted)

Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 2223, 167 L.Ed.2d 1014 (2007).

This rule of law was properly applied by the Montana Supreme Court when it recognized the trial judge stood in the best position to detect whether a challenged juror demonstrated bias. *Eklund v. Wheatland County*, 2009 MT 231, ¶ 42, 351 Mont. 370, 212 P.3d 297 (2009).

The *voir dire* examination by counsel for both parties was not perfunctory. It was extensive, and the judge was very attuned to possible prejudices. Counsel for Eklund and the County vigorously questioned the panel and elicited clear answers. The court excused jurors based upon concerns for impartiality, for actual bias. *Trans.*, pp. 58-59, 60-65, 67-69, 78-99, 100-117.

The Montana Supreme Court also correctly declined to impute bias based upon taxpayer status. As the Petitioner pointed out, this Court has recognized that: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood, supra*, 299 U.S. 123, 145-146. However, to impute bias based upon taxpayer status, is exactly such an artificial formula. Here, again, is the reason to accord deference to the trial judge in these matters – who better to determine the "state of mind" of the venire?

To impute bias – to deny a municipal taxpayer can be "appropriately indifferent" – also flies in the face of three recent damage awards by local juries in Montana: *See Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394; *Haman v. Maco Insurance Co.*, 2004 MT 44, 320 Mont. 108, 86 P.3d 34; *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587, overruled on other grounds,

Giambra v. Kelsey, 2007 MT 158, 338 Mont. 19, 162 P.3d 134.

If this Court were to accept Petitioner's argument of imputed bias, it would create just the sort of "particular test" that is clearly not specified in the Constitution. It would make constitutional a circumstance much better left in the hands of trial courts who have long experience seeking impartial juries under established rules and procedures.

IV. The Petition rests in large part upon unwarranted allegations of factual error by the jury because it did not find the County negligent; such error, if any, is not appropriate for review under Rule 10.

Petitioner posits much of his argument on the notion an impartial jury would have found liability and simply awarded his requested damages. Such factually based arguments are not appropriate grounds to grant certiorari.

Petitioner misstates the facts and law in dramatic one-sided fashion regarding the "hot pursuit" and "overwhelming evidence of negligence." The Montana Supreme Court recites a more balanced view of the testimony relating to the chase which certainly shows a finding of liability would not be required by any reasonable jury. *Eklund, supra*, 2009 MT 231, at ¶¶ 45-46. The "overwhelming evidence of negligence" is based upon opinion evidence elicited from Eklund's expert on high-speed chases. Juries are entitled to

ignore testimony they do not find credible or persuasive. It is not for this Court to declare unconstitutional the fact a jury finds certain expert testimony unpersuasive.

V. The Montana Supreme Court did not decide an important question of federal law that has not been, but should be, settled by this Court; nor has it decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner argues the Montana Supreme Court has somehow decided an important federal question in a way that conflicts with relevant federal law or decisions of this Court. Such a position is untenable because this Court has properly not ruled every taxpayer has an imputed bias when called as a venire in cases such as these. The decision below is certainly not in conflict.

Petitioner also argues this Court *should* settle the question that every taxpayer, when called for jury duty in a case such as this, has an imputed bias. He bases this request on the notion the same rules which apply to judges regarding tests for disqualification and impartiality must also apply to jurors. He states where there is "possible temptation" for unfairness because of a perceived pecuniary interest, a juror must be excused. There are numerous reasons such a ruling is not an appropriate basis for Rule 10 jurisdiction.

Common sense dictates that rules which govern the actions of a single individual adjudicator are not properly applicable to a jury of 12 citizen adjudicators whose actions are overseen by a judge. A jury does not, and cannot, act unilaterally. The due process stakes are clearly much higher when the one person who is going to decide a party's fate has a direct and substantial financial interest in the outcome. Juries by their very nature operate on a group dynamic with all the complications, pitfalls and advantages such a process entails. Impartiality in such circumstances, the state of mind of the group as it deliberates, is far more complex than for a single judge; the rules simply cannot suddenly be made analogous on *constitutional* grounds.

Petitioner's idea of a "possible temptation" test is not constitutionally sound because of the profound public policy and practical implications of imputing bias to taxpayers. Is this Court going to contrive a formula for when "possible temptation" exists? Can large landowners serve on juries if the requested damages are $500,000 but not on juries where the requested damages are two million dollars? Can small landowners serve on all juries, but large landowners only on those where the damage request is a certain amount?[4] Will the clerks of the trial

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[4] This Court, decades ago, properly invalidated ownership of real property as an acceptable test for entitlement to rights and privileges by all citizens. The sort of classification which would logically arise from differentiating between veniremen on

(Continued on following page)

courts have to maintain a current list of the appraised value of each prospective juror's property? Will that list become a part of the trial record? Will citizens who are part of a corporation or partnership that owns land be required to inform the clerk as to what exact portion of the real property tax liability they owe under the specific terms of that entity's corporate documents? Will a "possible temptation" test which relies on imputed bias of prospective taxpayer/jurors likely lead to a demand for change of venue in every case where a municipality is sued? Such a rule would create great strain on judicial resources. Would parties engage in "jury-shopping" seeking trial in jurisdictions depending on appraised value of real property? There is no end to the mischief such a rule, made constitutional, might produce.

The issue of jury impartiality does not need this Court to review on certiorari the Petition before it. Established law adequately addresses the standards and procedures for ensuring a constitutionally required fair tribunal including, but not limited to: 1) an attentive, diligent trial judge presiding over rigorous *voir dire* examination who then exercises discretion in removing challenged panel members, 2) availability of peremptory challenges, and 3) proper admonition by the judge throughout trial regarding proper consideration of evidence and law. No ruling of

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the basis of how much property each individual owns, sets up grounds for an equal protection challenge.

this Court is required to address further the requirements for a fair trial by a fair tribunal as requested in the Petition.

VI. The Montana Supreme Court correctly decided the case on the merits.

The Montana Supreme Court carefully reviewed the merits of the Petitioner's claims. As set forth above, it correctly decided the case on the merits. There is no compelling reason for this Court to review the findings and determinations of the Montana Supreme Court in this matter.

CONCLUSION

Certiorari is not warranted. Because there is no ground for plenary review, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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